No. 4203

United States

Circuit Court of Appeals

For the Ninth Circuit

UNION ASSURANCE SOCIETY, LTD.,
a Corporation,
Plaintiff in Error,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Defendant in Error.

APPELLANT'S BRIEF

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STATEMENT OF THE CASE.

The plaintiff in error insured the Spokane, Portland & Seattle Railway Company against loss or damage by fire, the policy covering a large amount

of property, including certain freight cars. On September 11, 1921, five of these cars were damaged by fire, the entire loss being $3,728.52. The amount of insurance on each car was $750.00, and under the terms of the policy the plaintiff in error became liable to and did pay the Spokane, Portland & Seattle Railway Company $3056.49. The policy of insurance contained the following provision (Transcript of Record, p. 25):

> "If this company shall clain that the fire was caused by the act or neglect of any person or corporation, private of municipal, this company shall, on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment."

The plaintiff in error claimed that the fire was caused by the act or neglect of the defendant in error, and therefore, upon making the payment of $3056.49 to the Spokane,Portland & Seattle Railway Company, demanded and received from that company an assignment, termed articles of subrogation, as follows (Transcript, pp. 27, 28):

BE IT KNOWN, That the Union Assurance Society, of London, did insure the Spokane, Portland & Seattle Railway Company, under its Policy No.

65037, issued at its Portland, Oregon, Agency, as follows: $3750.00 on box-cars No. S. P. 3164, 3287, 3187, 3041, 3179, an equal amount on each, for one year, commencing on the first day of March, 1921, and continuing until the 1st day of March, 1922.

FURTHER, That on the 11th day of September, 192-, a fire occurred, by which the property so insured was damaged or destroyed to the amount of Three Thousand Seven Hundred Twenty-eight and 52-100 Dollars, said fire having been caused by sparks from locomotive of the Oregon-Washington Railroad & Navigation Company:

NOW THEREFORE, in consideration of Three Thousand Fifty-six and 49-100 ($3,056.49) Dollars, to us in hand paid by the said Union Assurance Society, of London, in full settlement of our claim against said company, by reason of said loss, damags and policy of insurance 65037, do hereby assign, set over, transfer and subrogate to the said Union Assurance Society, of London, all the right, claim, interest, choses, or things in action, to the extent of Three Thousand Fifty-six and 49-100 ($3,056.49) Dolars paid to us as aforesaid, which we may have against Oregon-Washington Railroad & Navigation Company, or any other party, person, or corporation, who may be liable, or hereafter adjudged liable for the burning or destruction of said property, and hereby authorize and empower the said Union Assurance Society, of London, to

sue, compromise, or settle in our name or otherwise, and it is hereby fully substituted in our place and subrogated to all our rights in the premises to the amount so paid. It being expressly stipulated that any action taken by said company shall be without charge or cost to the Spokane, Portland & Seattle Railway Company.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY,

By ROBT. CROSBIE,
Secretary.

Signed, sealed and delivered in presence of

J. C. McCOMB,
J. M. BALLINGALL.

Dated November 1, 1921.

This action was brought to enforce the right so assigned.

As the errors claimed will require consideration of the pleadings, we believe repetition will be saved by setting out at this point the subtsantial allegations of the amended complaint and the answer. Paragraph I of the amended complaint alleges the corporate status of the parties. The remainder is as follows (Transcript, pp. 6-11):

II.

That on the first day of March, 1921, and thereafter, until and including the 11th day of September, 1921, the Spokane, Portland & Seattle Railway Company, a corporation, was the owner of five freight-cars of the type commonly known as box-cars, and designated respectively by the numbers 3164, 3287, 3187, 3041 and 3179. That on said first day of March, 1921, the plaintiff was, and at all times herein mentioned has been, engaged in the business of insuring against loss or damage to property by fire; and on said first day of March, 1921, the plaintiff executed and issued to the said Spokane, Portland & Seattle Railway Company its policy of insurance numbered 65037, wherein and whereby the plaintiff insured the said Spokane, Portland & Seattle Railway Company for the term of one year, commencing on the first day of March, 1921, and ending on the first day of March, 1922, against loss or damage by fire to the said freight-cars, in the sum of $750.00 on each of the said freight-cars; and said policy of insurance remained and was in full force and effect on the 11th day of September, 1921.

III.

That on the 11th day of September, 1921, the freight-cars aforesaid were standing with other cars on a side-track of the Spokane, Portland & Seattle Railway Company, adjacent to and within about fifteen feet from the main track of said Spokane,

Portland & Seattle Railway Company, near McLaughlin, in the State of Washington; and on said day the defendant, by its servants, agents and employes, ran over said main track and past said freight cars a train composed of cars and an engine or engines belonging to and operated by defendant. That said train was an east-bound freight train of defendant which passed said point at about noon of said day; that plaintiff does not know the number of said train, but defendant is fully informed as to the origin and circumstances of the fire hereinafter mentioned, and knows which of its trains caused the said fire. That defendant was so running its train over the tracks of the Spokane, Portland & Seattle Railway Company, under and by virtue of an agreement between the defendant and said Spokane, Portland & Seattle Railway Company, wherein the said Spokane, Portland & Seattle Company was designated as the Home Company and the defendant was designated as the Foreign Company, and wherein and whereby it was provided and mutually agreed, among other things, as follows:

> The Home Company shall not be held liable for or on account of any loss, damage, or delay, to the trains, engines, cars or other property of any kind of either company, nor to freight, baggage, or other property of any kind carried in or upon such trains, engines or cars, nor for or on account of any injury to or death of passengers or employees of either company, or other persons whomsoever, which may be incurred

or sustained by reason of such trains being detoured, or by reason of such trains being delayed in such detouring, in whatever manner the same may be caused or occasioned, whether by or through negligence of the Home Company, its agents or servants, or by reason of defects in the tracks, structures or facilities furnished by the Home Company, or otherwise, it being understood and agreed that all risk of such delay, loss, damage, injury and death shall be and is hereby assumed by the Foreign Company, and the Foreign Company shall and will hold harmless the Home Company from and against all liability or claims for all such delay, loss, damage, injury and death, and shall and will execute and deliver, or cause to be executed and delivered, to the Home Company, upon request, a full and complete release, satisfaction and discharge of all claims therefor, and will pay, or cause to be paid, all costs, and expenses incurred by either Company in the clearing of the wrecks and repairs of equipment, track and property in which by reason of detour movements covered by this agreement the engines, trains or cars of the Foreign Company are concerned, expenses and atorney's fees incurred in defending any action, which may be brought against the Home Company on account of any such claim or liability and any judgment which may be rendered against the Home Company on acount thereof.

IV.

That at said time, and for about three months prior thereto, the weather was and had been hot and dry, and on said 11th day of September, 1921, the vegetation, structures and combustible objects along and adjacent to the track of the Spokane, Portland & Seattle Railway Company over which the defendant was so operating its train, were dry and inflammable; and said condition was well knawn to defendant.

V.

That nevertheless, defendant carelessly and negligently hauled said train with its engine or engines burning coal, which produced and threw out large quantities of burning particles upon the dry vegetation and other dry and inflammable objects adjacent to said track, and carelessly and negligently failed to equip its said engine or engines with safe, proper or adequate devices for preventing the escape of such burning particles, and carelessly and negligently failed to keep its said engine in such repair and condition as would prevent the throwing out of such burning particles, and carelessly and negligently hauled in said train a large number of cars constituting a load so great that said engine labored heavily and thereby increased the number and size of the burning particles so thrown out, and carelessly and negligently ran the said train at a speed so great that the labor of the engine and the throwing out of burning particles was further in-

creased. That while said train of defendant was so being run, and by reason of such negligence, defendant negligently and carelessly caused its engine attched to said train to throw out burning particles of coal or other substance upon the said freight-cars or the dry vegetation or other dry material adjacent to the said freight-cars, and thereby set the said freight-cars on fire.

VI.

That by the fire so caused and set, said freight-car number 3164 was damaged in the amount of $924.25, and said car numbered 3287 was damaged to the amount of $917.79, and said car numbered 3187 was damaged to the amount of $921.37, and said car numbered 3041 was damaged to the amount of $908.61, and said car numbered 3179 was damagedto the amount of $56.49; making the total of damage upon and to the said five cars $3,728.52. That under and by reason of its policy of insurance aforesaid, the plaintff has paid to said Spokane, Portland & Seattle Railway Company $750.00 each on account of such loss and damage to the cars numbered 3164, 3287, 3187, and 3041, and the sum of $56.49 on account of such loss and damage to car numbered 3179; making the total paid by plaintiff to the Spokane, Portland & Seattle Railway Company on account of such loss and damage, $3,056.49. That such payment was made by plaintiff to the Spokane, Portland & Seattle Railway Company on or about the 18th day of November, 1921.

VII.

That in and by the policy of insurance aforesaid it was, among other things, provided and agreed between plaintiff and the Spokane, Portland & Seattle Railway Company, that if plaintiff should claim that any fire causing loss or damage insured against was caused by the act or neglect of any person or corporation, the plaintiff should, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting from such fire, and that such right of recovery should be assigned to plaintiff by the insured on receiving such payment. That upon payment by plaintiff to the Spokane, Portland & Seattle Railway Company of said sum of $3,056.49 as aforesaid, and in consideration thereof, Spokane, Portland & Seattle Railway Company did assign, set over, transfer and subrogate unto the plaintiff all of its rights, claims and causes of action against the defendant for or on account of the said fire and the loss and damage to the said freight-cars resulting therefrom, to the extend of said sum of $3,-056.49, and plaintiff is still the owner and holder of the rights, claims and causes of action so assigned and transferred.

WHEREFORE, plaintiff prays judgment against defendant for the sum of $3,056.49, and for its costs and disbursments.

The answer is as follows (Transcript, pp. 13-18):

I.

Denies that it has any knowledge or information sufficient to form a belief as to the truth or falsity of the matters set forth in paragraph I of plaintiff's said amended complaint, and defendant therefore denies the same and the whole thereof, except that defendant admits that the defendant is and at all of the times mentioned in plaintiff's amended complaint was a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business at Portland, and that it is and at all of said times was a citizen of the State of Oregon within the meaning of the laws of the United States relating to the jurisdiction of the courts of the United States.

II.

Denies that it has any knowledge or information sufficient to form a belief as to the truth or falsity of the matters set forth in paragraph II of plaintiff's said amanded complaint, and defendant therefore denies the same and the whole thereof.

III.

Denies each and every allegation set forth in paragraph III of plaintiff's amended complaint and the whole thereof, except that defendant admits that on the 11th day of September, 1921, the Spo-

kane, Portland & Seattle Railway Company, a corporation, owned a railroad right of way at and near McLaughlin, in the State of Washington, together with a main track located on said right of way, and that said Spokane, Portland & Seattle Railway Company was at said time operating a railroad over said right of way and track, and that on said 11th day of September, 1921, a certain eastbound freight train belonging to defendant was run and operated over and along said right of way and track of said Spokane, Portland & Seattle Railway Company passing McLoughlin, Washington, at about noon of said day, with certain engines numbered 2113 and 2128, the property of the defendant, operated, directed and controlled by a pilot engineer furnished by said Spokane, Portland & Seattle Railway Company, subject to the rules and regulations of said company and to the orders of the train-dispatcher of said company. And said defendant further admits that said train was run and operated over said track of the Spokane, Portland & Seattle Railway Company under and by virtue of an agreement between the defendant and said Spokane, Portland & Seattle Railway Company, wherein the said Spokane, Portland & Seattle Railway Company was designated as the Home Company and the defendant was designated as the Foreign Company, and wherein and whereby it was provided and mutually agreed, among other things, as is set forth by plaintiff on page 3, lines 5 to 20, inclusive, of its amended complaint.

IV.

Admits the allegations of paragraph IV of plaintiff's said amended complaint, except that defendant denies that it had any knowledge of the condition on said 11th day of September, 1921, of the property of said Spokane, Portland & Seattle Railway Company, or of the vegetation, structures or objects thereon, save only as such property, vegetation, structures and objects may have been observed by its employees during the movement of the trains of defendant over the tracks of said Spokane, Portland & Seattle Railway Company, and defendant particularly denies any knowledge which required the defendant to exercise greater care and precaution than was exercised by said defendant in the movement of its trains over the tracks of the Spokane, Portland & Seattle Railway Company.

V.

Denies each and every allegation, averment and thing set forth and contained in paragraphs V. VI and VII of plaintiff's said amended complaint, and each and every part and the whole thereof.

And for further and separate answer and defense to plaintiff's amended complaint, defendant alleges:

I.

That on the 11th day of September, 1921, the defendant owned a certain freight train known and

designated as Extra East No. 2113, propelled by locomotives Nos. 2113 and 2128, which was run in an easterly direction over and along the tracks of the Spokane, Portland & Seattle Railway Company passing McLaughlin in the State of Washington, at about noon of said day; that said freight train was the only freight train belonging to this defendant which was run in the vicinity of McLaughlin, Washington, in an easterly direction for a period of several hours prior to noon on said 11th day of September, 1921; that said freight train was operated by a pilot engineer of the Spokane, Portland & Seattle Railway Company with the assistance of engine crews and train crews of this defendant, and subject to the orders of the train-dispatcher of said Spokane, Portland & Seattle Railway Company, and to the rules and regulations of said company; that on said 11th day of September, 1921, and immediately prior thereto said locomotives numbered 2113 and 2128 were of first-class construction and repair and were equipped with suitable and proper spark-arresting devices, and said spark-arresting devices were at said time and place in proper position and in good condition and repair, and said locomotives were and each of them was furnished and supplied by this defendant with fuel of first-class quality and grade, and said locomotives were properly operated and maintained by competent employees, and were not overloaded, nor working up to their capacity, and everything was done in the construction, maintenance and operation of said locomotives to make them safe and secure against the escape of fire

therefrom, and this defendant alleges that the fire complained of by plaintiff was not ignited or set by any of its officers, agents or employees, or by locomotive No. 2113 or locomotive No. 2128, or by any other locomotive of defendant operated over the line of railroad of the Spokane, Portland & Seattle Railway Company, or otherwise, and defendant alleges that said alleged fire complained of by plaintiff was not caused by or through any act, fault, negligence or want of care on the part of this defendant or any of its agents, servants or employees. That the circumstances herein referred to are the same circumstances mentioned in plaintiff's amended complaint.

WHEREFORE, defendant having fully answered plaintiff's amended complaint herein, prays that this action be dismissed and that plaintiff take nothing thereby, and that defendant do have and recover its costs and disbursements herein.

Two points are involved in this appeal, as follows:

First: The plaintiff in error offered in evidence a certain bill rendered by the Spokane, Portland & Seattle Company to the defendant in error, which appears at length on pages 30, 31 and 32 of the transcript, with proof of payment thereof. This bill described particularly the cars referred to in the complaint, gave their respective values and the damage to each which was caused by the fire of

September 11th, 1921, on which this action is based, such damage aggregating $3728.52, and showed a balance of $672.03, over and above the sum of $3,-056.49 covered by insurance. Plaintiff in error offered to prove that this bill, representing the balance of loss on the same cars and by the same fire, was paid by defendant in error upon presentation, whereby it admitted the fact, nature and extent of its liability. This offer resulted in extended argument, as appears from the bill of exceptions (Transcript, pp. 33-54). In the course of that argument, it was contendedbytheattorney for the defendant in error that the payment of the bill was not competent as an admission of liability, because the payment was made by reason of the contractual liability created by the agreement set out in paragraph III of the amended complaint, and therefore did not imply an admission of negligence. The following summarizes his position (Transcript, p. 40):

> COURT: Your position, Mr. Murphy, I understand is you made this payment by reason of your contract, and under your contract and not because of any admission of any negligence on your part.
>
> MR. MURPHY: That is my point.

The court rejected the evidence offered, holding that the payment was made in recognition of a contractual liability, and therefore was not an admission of negligence, and holding further that the cause of action set up in the complaint was based

on negligence (Transcript, pp. 51, 52). The attorney for defendant in error protested that the complaint contained, in addition to the allegations of negligence, a complete statement of all facts necessary to constitute a cause of action based upon this contractual liability and the assignment thereof, and that in the absence of any motion requiring an election, it was entitled to recover on either ground (Transcript, pp. 52, 54). The court adhered to its ruling, holding that the complaint must be construed as an action for negligence; and an exception was taken (Transcript, p. 54).

Second: Plaintiff in error requested an instruction, which apears at length in the specifications of error, to the effect that under the detour agreement set out in paragraph III of the complaint, and the assignment to it by the Spokane, Portland & Seattle Railway Company, plaintiff in error was entitled to recover without proof of negligence. This instruction was refused, and an exception taken.

SPECIFICATION OF ERRORS

Plaintiff in error claims that in the trial of this cause the following errors occurred, which are hereby specified and relied upon, to-wit:

I.

That the United States District Court for the District of Oregon erred in excluding from evidence

and from consideration by the jury, and in refusing to admit in evidence in said cause that certain written instrument offered in evidence by the plaintiff and hereinafter set forth, together with the voucher-check thereto attached, being a voucher-check of the defendant in favor of the Spokane, Portland & Seattle Railway Company for the sum of $672.03 which was marked "paid and cancelled", said instrument being a bill of the Spokane, Portland & Seattle Railway Company against the defendant and being receipted so as to show payment by the defendant on or about the 7th day of February, 1922, and said instrument or bill being in words and figures, as follows:

Portland, Ore., Nov. 15, 1921.

Oregon-Washington R. R. & Navigation Co.,
F. W. Sercombe, Auditor,
Portland, Oregon.

To Spokane, Portland & Seattle Railway Company, Dr.

Remit to Chas. C. Rose, Treasurer, Portland, Ore.
Department Memo. No. 22882.

For value of SP&S Cars 3287, 3187, 3164 and 3041, which were destroyed, and cost of repairs to SP&S Car 3179, which was damaged by fire September 11, 1921, at McLaughlin, Washington, due to sparks from your coal burning engine passing over our line under detour arrangements.

SP&S 3041, 40-ft. box car, 80,000 capacity, of wood construction, built October, 1910.		
Weight, 35,100 lbs.		
Reproduction value at .0512 per lb.	$1797.12	
Less depreciation 10 yrs. 11 mo. at 4% per annum	784.74	
Depreciated value	1012.38	
Less net value of salvage recovered	103.77	
Net loss	$ 908.61	
Less amount recovered from insurance	750.00	
		$158.61
SP&S 3164, 40-ft. box-car, 80,000 capacity, of wood construction, Built October, 1910, weight 35,800 lbs.		
Reproduction value at .0512 per lb.	1832.96	
Less depreciation 10 yrs., 11 mo., at 4% per annum	800.39	
Depreciated value	1032.57	
Less value of net salvage recovered	108.32	
Net loss	924.25	

Less amount recovered from insurance	750.00	
		$174.25
SP&S 3187, 40-ft. box-car, 80,000 capacity, of wood construction, built October, 1910. Weight 35,400 lbs.		
Reproduction value at .0512 per lb.	1812.48	
Less depreciation 10 yrs., 11 mo., at 4% per annum	791.45	
Depreciated value	1021.03	
Less net value of salvage recovered	99.65	
Net loss	$ 921.38	
Less amount recovered from insurance	750.00	
		$171.38
SP&S 3287, 40-ft. box car, 80,000 capacity, of wood construction. Built October, 1910. Weight 35,000 lbs.		
Reproduction value at .0512 per lb.	1817.60	
Less depreciation 10 yrs. 11 mo. at 4% per annum	793.67	
Depreciated value	1023.93	

Less net value of salvage recovered	106.14	
Net lass	917.79	
Less amount recovered from insurance	750.00	
		$167.79
		$672.03
SP&S 3179, Net cost of repairs per Vancouver Shop Order No. 2609,	56.49	
Less amount recovered from insurance	56.49	
		No charge.

Amount of this bill is $672.03.

II.

That the said Court erred in refusing to give to the jury the instruction requested in writing by plaintiff and being by it numbered 4 and which was in words as follows, to-wit:

> "It is admitted by the pleadings that the dedefendant was operating this train over the tracks of the Spokane, Portland & Seattle Railway Company under a written agreement, which contained certain provisions alleged in the complaint and admitted by the answer. I instruct you that under those provisions, the defendant assumed liability to the Spokane, Portland & Seattle Railway Company for any damages

which might be done to the property of Spokane, Portland & Seattle Railway Company through the operation over its tracks of the defendant's trains; and the plaintiff as assignee of the Spokane, Portland & Seattle Railway Company, is therefore entitled to your verdict, if you find that defendant's locomotive set this fire, even though you may believe that defendant was not negligent."

III.

That the Court erred in rendering judgment in the said cause in favor of the defendant and against the plaintiff.

ARGUMENT.

The first question to be considered is whether, under the pleadings, plaintiff in error can recover without proving negligence. This involves a construction of the amended complaint, and a construction of the so-called detour agreement.

The complaint alleges (Par. II) that the Spokane, Portland & Seattle Railway Company owned certain cars, which plaintiff had insured. In paragraph III, it is alleged that on September 11, 1921, these cars were standing on a certain side-track of the Spokane, Portland & Seattle Railway Company, adjacent to its main track, and that defendant ran over said main track a freight train, which it was operating under a detour agreement with the Spo-

kane Company, containing certain terms, quoted in paragraph III. We claim, and for the present will assume, that these provisions cast upon the defendant liability for any damage caused by it in the course of such detouring, no matter whether it was or was not negligent. So far, the allegations of the complaint are entirely consistent with a claim of contractual liability to the Spokane company, and an assignment thereof to plaintiff. In fact, we fail to see how the reference to the detour agreement can be contrued otherwise than as evidence of an intention to rely on the liability which it created. Otherwise, it would seem to be superfluous.

Paragraph IV relates to the weather and the condition of the vegetation; and it is conceded that this paragraph might have been dispensed with if plaintiff had intended to rely wholly on the detour agreement.

Paragraph V contains various allegations of negligence, which would be superfluous if contractual liability only had been relied upon. However, it contains also the distinct allegation that while the train of defendant was so being run, the locomotive threw out sparks, and thereby set these freight cars on fire.

Paragraph VI alleges the damage done to the various cars, and the payments which plaintiff made to the Spokane company, under its insurance policy.

Paragraph VII sets out the provisions of the

policy relative to subrogation, and the assignment to the plaintiff of the claims of the Spokane company against defendant growing out of this fire.

We believe it is manifest that the complaint states a complete cause of action, based upon the contractual liability of defendant to the Spokane company under the detour agreement, and an assignment thereof to plaintiff. It is alleged that these cars were insured by plaintiff to the amount of $750.00 each; that defendant set them on fire, thereby damaging four of them in excess of $750.00 each, and a fifth to the amount of $56.49; that plaintiff was bound to and did pay the Spokane company $3056.49 under its policy; that the train of defendant which set the fire was being operated under a detour agreement which made defendant liable to the Spokane company; that by the terms of the insurance policy, if the plaintiff claimed the loss was caused by the act or neglect of defendant or any other person, the Spokane company was bound to assign to plaintiff its right of recovery against defendant or such other person; and that such assignment has been made.

In the argument before the District Court, some question was raised whether such liability based on the detour agreement could be or was assigned. However, this point seems too clear to require citation of authorities or extended argument. Entirely aside from the policy provisions, the claim, being one for damage to property, was assignable. It might have been assigned to John Doe or Richard

Roe or any other stranger to the transaction. It was assigned to this plaintiff in error. However, the assignment was clearly within the express terms, as well as the intent, of the policy provision. The policy says the insurer shall be entitled to subrogation if it claims that the loss was due to the **act or neglect** of another. The clear intent of that provision is that the insurer shall have the benefit of any right of recovery which the assured may have against others.

Having stated a complete cause of action growing out of the mere setting of the fire, are we barred from recovery thereon because we have also alleged that the fire was set negligently? The question appears to be one of Oregon law and practice.

In **Harvey vs. Southern Pacific Company,** 46 Ore., 505, the action was for damages for the killing of an animal by defendant's train. In the opinion, written by Chief Justice Wolverton, it is said on pages 509-511:

> 1. The first question presented for our determination is one of practice, and arises upon the trial court's allowance of the motion requiring the plaintiff to elect as to which cause of action he would proceed upon at the trial. The complaint, we think, may appropriately be characterized as containing a duplicate statement of distinct grounds of recovery for the same right of action; the right arising from the single transaction in killing plaintiff's animal. The defendant is charged, however, with two

culpatory acts in the invasion of plaintiff's right —one for the common-law negligence, and the other for failure to fence, a duty imposed upon it by statute—for either one of which plaintiff is accorded a right of action but the relief is different. Upon the ground first named, the measure of relief is the value of the animal lost, but upon the other is the value of the animal, enhanced by reasonable attorney's fees for the prosecution of the action (Section 5146, B. & C. Comp.), so that there are stated in the complaint two grounds of recovery for the same right; affording the plaintiff different reliefs, according to the cause maintained. He could not have two judgments, however, and a judgment in the one form would preclude a judgment in the other, as the law does not allow double damages for the invasion of the same right. For joining the two grounds or causes of action in the same count, the defendant had its motion before answer to strike out the complaint because they were not separately stated; (B. & C. Comp., Sec. 81). By pleading over the right to interpose such a motion was waived.

2. There is, however, another exigency to which this motion does not extend. If there be duplicate statements of the same cause of action, or statements of different grounds of recovery for the same right, the defendant is entitled. unless in exceptional cases, to have the plaintiff elect upon which ground or cause he will proceed to trial, and the motion directed to that purpose may be interposed at any time before the trial. Mr. Pomeroy states the rule as follows: "Since the reformed pleading requires the facts to be

averred as they actually took place, it does not, in general, permit a single cause of action to be set forth in two or more different forms or counts, as was the familiar practice at the common law. The rule is undoubtedly settled that, under all ordinary circumstances, the plaintiff who has but one cause of action will not be suffered to spread it upon the record in differing shapes and modes, as though he possessed two or more distinct demands; and, when he does so without special and sufficient reason, he will be compelled, either by a motion before the trial, or by an application and direction at the trial, to select one of these counts, and to abandon the others": Pomeroy, Code Rem. (4 ed.), Sections 467, *576. Mr. Phillips says: "It may safely be said that the true rule, resting upon principle and supported by the weight of authority, now is that where a plaintiff has a single right of recovery that may rest upon one ground or upon another, according to the facts to be shown by the evidence, and he cannot safely foretell the precise nature and limits of the defendant's liability to be developed upon the trial, he may state his right of action variously, in separate causes of action. This privilege is an exception to the general rule that each separate statement should set out a distinct and independent right of action, and, inasmuch as a plurality of statements multiplying the issues and tends to obscure the real claim which the defendant will have to meet it is to be indulged only where it is fairly necessary for the protection of the plaintiff, and where it will not mislead or embarrass the defendant in his defense": Phillips, Code Plead. Sec. 207. See, also, Spaulding vs.

Saltiel, 18 Colo. 86 (31 Pac. 486); Cramer vs. Oppenstein, 16 Colo. 504 (27 Pac. 716); Brown vs. Kansas City, etc. Ry. Co., 20 Mo. App. 429; Otis vs. Mechanics' Bank, 35 Mo., 128; Cartin vs. South Bound R. C. 43 S. C. 221 (20 S. E. 979, 49 Am. St. Rep. 829).

It was held that plaintiff was properly required to elect one or the other ground of recovery. As appears from paragraph IV, on page 512, this decision was based on two grounds: first, that the relief was different under the two theories; and second, that the nature of the liability was clear, so that plaintiff's rights were not in doubt. It is said (p. 512):

> 4. There should not be a confusion of the right of action. Different rights of action should always be separately stated when they can be nited in the same complaint. Different grounds of action for the same right give rise to different causes, which may or may not be united, according to the rule denoted by the above authorities. In the present case, as we have seen, different grounds are assigned in the same count. The right of action is esentially the same, but the relief is different. For this latter reason the trial and the adjustment of a verdict would be attended with more or less confusion, and, the grounds being such in either alternative that the plaintiff must have known the precise nature and limits of the defendant's liability, we are of the opinion that the trial court's discretion in the premises was legally and properly exercised.

In **Hoag vs. Washington-Oregon Corporation,** 75 Or., 588, the action was for personal injuries, and the complaint contained allegations showing liability for negligence at common law, and also under the Employers' Liability Law of Oregon. In the opinion on rehearing in banc, concurred in as to this point by all of the justices, it is said, on pages 601-603:

> 7. Beyond question the complaint states facts sufficient to justify a recovery either under the common law or under the statute, but it states only one cause of action.
>
> 8. In common with all the Code states, our statute (Section 67, L. O. L.) requires a complaint shall contain "a plain and concise statement of the facts constituting the cause of action." A "cause of action" comprehends two elements: (1) A legal right on the part of the plaintiff; and (2) a breash of a corresponding duty on the part of the defendant to accord that right: Pomeroy's Rem., Sec. 452; Words and Phrases, tit. "Cause of Action." From this definition it follows, necessarily, that all breaches of legal duty arising out of one transaction, whether flowing from common law or from the statute constitute but one cause of action, unless the statutory remedy is so inconsistent with the common-law remedy that the same judgment could not be rendered upon recovery. In such instances the plaintiff may be required to elect upon which cause of action he will proceed. Thus in Harvey vs. Southern Pac. Co., 46 Or. 505 (80 Pac. 1061), the plaintiff brought an action for the killing of stock upon a railroad track,

and in his complaint set up in a single count facts showing a right of recovery at common law, where the measure of damages is the value of the animals injured, and a right of recovery under the statute which gave, under certain circumstances, triple damages for a like injury. It was held that he might have been required to elect upon which cause he would proceed, but that, the defendant having failed to move for the court to compel such election on the trial, he could not afterward raise the objection. The reason for this holding is apparent, because, if a jury should return a general verdict, the court would be unable to determine whether to assess triple damages or to enter judgment for the amount found in the aerdict.

9. But in the case at bar the measure of damages is the same in either case; the difference between the common-law liability and that arising under the statute being that additional duties on the part of the employer to the employee are added by the statute to those existing at common law. The whole obligation of the employer to the employee is the sum of all the duties imposed by law, whether common law or statute, and the rights of the employee to redress for a breach of these duties arises from the law, considered as a whole, irrespective of its source. The case presented by the pleadings involved a double aspect charging matters upon which a recovery might have been had either at common law or under the Employers' Liability Act, and the defendant, without demurring, moving to make more definite and certain, or to elect, promptly answered, denying all allegations of

> negligence and pleading assumption of risk and contributory negligence. The testimony went in with few objections on either side, and it was only when requests for instructions were refused or when objections to instructions given were excepted to that the question as to the double aspect of the case was raised. After a careful examination of the authorities, including Schulte vs. Pacific Paper Co., 67 Or. 334 (135 Pac. 527, 136 Pac. 5), and our former opinion in the case at bar, we have arrived at the conclusion that, under the pleadings and evidence in this case, it was not error for the court to instruct both as to the liability of the defendant at common law and under the statute, and to say to the jury that, if the acts showed a liability or lack of liability, as tested by the whole law on the subject, they should render a verdict consonant with the law considered as a whole; and, further, that if facts showed a breach of the employers' liability statute, the defenses of contributory negligence and assumption of risk should be eliminated.

These decisions seem conclusive. Under them, it is clear that plaintiff in this case has stated but one cause of action, namely, one acruing to the Spokane company by destruction of these cars and assigned to plaintiff. The measure of recovery was precisely the same on either theory, namely, the loss inflicted by defendant's act.

It is unnecessary to speculate whether the complaint might have been stricken upon timely motion on the ground that it stated two causes of action, or whether plaintiff might have been required to

elect between its allegations of negligence and its allegations of liability byreason of the detour agreement. No such motion was presented, nor did the court of its own motion require an election. It simply held that the allegations respecting the detour agreement must be ignored, or treated as matters of inducement or explanation.

Those allegations were not so intended, nor can they on any reasonable theory be so treated.

If plaintiff was to be required to elect, it should have been allowed to make the election for itself. It should not have been deprived summarily, and for reasons not even indicated in the objection or arguments of oposing counsel, of a ground of recovery pleaded adequately and not attacked by any appropriate motion.

THE DETOUR AGREEMENT.

The question whether the detour agreement did in fact impose upon defendant in error liability for the destruction of these cars, regardless of negligence, appears to have been settled for the purposes of this case by the position taken by counsel. It is true, that a strong effort was made to claim an advantage without incurring the appropriate penalties; but that effort was hardly successful. It is difficult to eat ones cake and still retain it for another meal. The sum and substance of counsel's objection to the bill offered and excluded was, that the detour agreement cast upon defendant in error

a liability additional to and different from that otherwise existing. He argued that payment of this bill did not imply an admission of negligence, because under the detour agreement the defendant in error was liable without negligence. The court took him at his word, and excluded the evidence.

The point made or the ruling thereon cannot be justified upon any other theory. In any case of this kind, where payment of one claim arising out of a given transaction is offered as an admission of liability in connection with another claim, it is doubtless open to the opposing party to explain that the payment was made gratuitously, or for some other reason not applicable to the case on trial. However, this is defensive matter, and does not and can not affect the admissibility of the evidence in the first instance. It was therefore no legitimite objection to the evidence offered in this case for counsel to say that the bill might have been paid gratuitously, or in recognition of a moral obligation, or for the sake of preserving good relations between the awo railroad companies. The admissibility of the evidence had to be tested according to the facts then before the court. If the detour agreement did in fact cast upon the defendant in error a liability independent of negligence, then the point was a legitimate one; but if it did not create such liability, then the point made was obviously without merit, and the argument in support of it was meaningless, and the decision cannot be explained or defended. We believe, therefore, that counsel for defendant

in error must be deemed to have admitted, and the trial court must be deemed to have held, that the detour agreement did make the defendant in error liable for the destruction of these cars without regard to negligence, and that for the purposes of this case, the point must be regarded as settled.

However, if it is deemed open to argument, we believe the construction of this detour agreement is clear.

As stated in the argument at the trial, this agreement is closely knit, and each word has a meaning. It provides that

> The Home Company shall not be held liable for or on account of any loss, damage, or delay of the trains, engines, cars or other property of any kind of either company.

As in any event the home company could not be liable in the ordinary sense for injury to its own property, the full meaning of this expression must be sought further on. A little later, and in the same sentence, and in the same connection, the agreement goes on to say,

> It being understood and agreed that all risk of such delay, loss, damage, injury and death shall be and is hereby assumed by the foreign company.

In using this language, the agreement refers, among other things, to risk of damage to property of the Spokane, Portland & Seattle Railway Company which is described in the agreement as the Home Company. This expression, as applied to

damage to property of the home company, can mean only that the defendant in error as the foreign company shall be liable for or shall make good any loss which the home company may suffer to its own property through the detour movements of the foreign company. To hold otherwise would be to deprive the language of any meaning whatever.

> Further on in the same sentence, and in the same connection, it is provided that the foreign company will pay or cause to be paid all costs and expenses incurred by either company in the clearing of wrecks and repairs of equipment, track and property, in which, by reason of detour movements covered by this agreement, the engines, trains or cars of the foreign company are concerned.

The obvious meaning of this language is, that the defendant in error as the foreign company will make or pay for all repairs to the property of the home company which may be made necessary by any act of the foreign company in connection with the detour movements. It was admitted by counsel upon the argument that within the meaning of this provision the defendant in error as the foreign company would have been required, regardless of negligence, to pay for the repairs of these identical cars if they had been repaired. The record shows that one of the cars was damaged only to a comparatively slight extent, and that it was subject to repair, and doubtless was repaired; and it shows further that there was a substantial salvage of metal parts of all the cars involved, so that their restoration

might in a sense be deemed a repair. However this may be, it would be strange to construe the agreement in such a way that the defendant in error as the foreign company would be required to pay for repairs an a car damaged to the extent of say one-third or two-thirds of its value, but would not be required to pay for a car destroyed entirely.

We therefore believe that the reasonable construction of this detour agreement requires that the agreement be hald to impose upon the defendant in error liability for damage caused by it in the course of the detour movements to the property of the home company. The parties to the agreement have so construed it in their transactions, and the defendant in error has claimed that construction at a point in the trial of this case where it appeared advantageous.

Aside from this primary question of liability, the bill offered and rejected was admissible for other and minor purposes. The question of negligence was not the only one involved in the case. The setting of the fire by the defendant in error and the amount of damage caused thereby were put in isssue. Even if the rendition and payment of the bill did not amount to a complete admission of liability, nevertheless they did imply an admission that defendant set the fire, and thereby caused damage to a stated extent. Exclusion of the bill and the accompanying evidence was therefore error, even if the detour agreement were to be construed as creating no liability in the absence of negligence.

ADMISSIBILITY OF THE REJECTED BILL AND EVIDENCE OF ITS PAYMENT.

It is well settled, that payment to one person of a claim arising out of a given injury, may be proved as an admission of liability in an action by another person growing out of the same injury.

In the case of **Weiss vs. Kohlhagen,** 58 Ore., 144, the plaintiff was the lessee of a certain building, and had therein a stock of merchandise. Defendant in the course of excavating on adjoining premises, caused this building to fall, whereby damage was done to plaintiff's property. Plaintiff offered to prove that defendant had settled with Marsters, the owner of the building. It is said, on page 153:

> George Kohlhagen, defendant, as a witness in his own behalf, upon cross-examination, was asked:
>
> "Now is it not a fact, Mr. Kohlhagen, that after the Marsters biulding fell down that you paid Mr. Marsters for his building and damages?"
>
> This was objected to by defendant's counsel, the objection sustained and exception duly saved. It may be shown that the party claimed to be liable has settled with others in the same position as plaintiff; Howland vs. Bartlett, 86 Ga. 669 (12 S. E. 1068); Campbell vs. Missouri Pacific R. Co. 86 Mo. App. 67; Grimes vs. Keene, 62 N. H. 330; 16 Cyc. 594, and note.

The court comments upon the fact that the

answer expected was not disclosed, and it did not appear whether the settlement was a compromise. In the present case, the offer of evidence disclosed all of the facts, and it was obvious on its face that there was no compromise, as the bill submitted was paid as rendered, and covered the entire amount of the damage incurred.

The rule is laid down as follows in 22 C. J., page 320, Section 354:

> It may be shown as an implied admission that the party claimed to be subject to a certain liability has paid the claims of others who were in the same position as the claimant; but a compromise between a party and a third person cannot be shown, even though it relates to the same matters involved in the action, and the person with whom the compromise was made was in the same position as the party seeking to show such compromise, except under unusual circumstances. A settlement by an injured person with an accident insurance company in which he carried a policy is not admissible in an action by him against the person whose alleged negligence caused the injury.

The subject is also discussed at length, and the same conclusion is announced, in the case of **Michigan Mutual Home Insurance Company vs. Pere Marquette Railway Company,** 193 Mich., 429..

On the face of the transaction, the rendition and payment of this bill amounted to an admission of full liability. If there was anything in the nature

of a gratuitous payment or compromise, defendant in error was undoubtedly entitled to show that fact, but nevertheless the evidence was admissible in the first instance.

The question raised by the second specification of error, relating to an instruction requested by plaintiff in error and refused by the court, does not apear to require separate discussion, as the point involved is substantially the same as the ones already argued. Apparently this instruction was refused because the court had ruled that under our complaint we could not recover otherwise than upon proof of negligence. If that ruling was erroneous, and if the detour agreement by its terms or according to the construction put upon it by the defendant in error for the purpose of this case did impose upon the defendant in error liability for destruction of these cars without regard to negligence, we were entitled to this instruction. Otherwise we were not. All of these questions have been discussed in connection with the first specification of error.

For the reasons stated, we respectfully ask that the judgment of the District Court be reversed.

Respectfully submitted,

VEAZIE & VEAZIE,

J. C. VEAZIE,

Attorneys for Plaintiff in Error.